Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1734

THE WARDEN OF THE WEST VIRGINIA PENITENTIARY,
Petitioner,

v.

ROGER JONES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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May 24, 1978

IN THE

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NO._____

THE WARDEN OF THE WEST VIRGINIA PENITENTIARY,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

The petitioner, the Warden of the West Virginia Penitentiary, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia entered in this proceeding on January 17, 1978, and made final when that court denied petitioner Warden's petition for rehearing on March 6, 1978.

OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia, not yet reported, appears as Appendix A hereto. This action began in that court as a habeas corpus proceeding under the court's original jurisdiction.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on January 17, 1978. A timely petition for rehearing was denied on March 6, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the retroactivity rule of *Hankerson* v. *North Carolina*, ... U. S. ....., 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977)—which was on direct review—must be applied in a case on collateral review.

STATEMENT OF THE CASE

1. Nature of Proceedings Below

Respondent Jones was convicted by the Circuit Court of McDowell County, West Virginia, on November 29, 1972, of first-degree murder. After his conviction had become final, he petitioned the Supreme Court of Appeals of West Virginia, by invoking its original jurisdiction, for a writ of habeas corpus ad subjiciendum. He based his petition on the ground that that court's decision in *State* v. *Pendry*, 227 S.E.2d 210 (W. Va. 1976)—that a certain "deadly weapon" jury instruction unconstitutionally shifted the burden of proof under *Mullaney* v. *Wilbur*, 421 U. S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)—had to be applied retroactively in his case, in which an identical instruction had been used. App. A, 2-4.

The Supreme Court of Appeals of West Virginia had limited the retroactivity of *State* v. *Pendry*, *supra*, to "all criminal cases now in the trial or appellate

process." 227 S.E.2d at 224; App. A, 3. Respondent Jones claimed that *Hankerson* v. *North Carolina*, *supra*, went beyond *Pendry's* scope of retroactivity and required that *Pendry* be applied to his case. R. 3.

The specific argument made by petitioner Warden below was, pursuant to the suggestion in Footnote 8 of *Hankerson*, *supra*, ... U. S. at ....., 97 S. Ct. at 2345-2346, that Jones had failed to object at trial to the flawed instruction. R. 13-19; App. B, 6-12.* Rejecting this argument, the State Supreme Court said:

> "We believe Respondent's [petitioner Warden's] argument incisively ferrets out the ambiguities in the *Hankerson* opinion and may be a technically viable means of avoiding its full impact. But we decline to use that method of insulating past criminal convictions from the ambit of *Mullaney*, *Pendry*, and *Hankerson*. Safeguarding the integrity of the factfinding process must take priority over procedural concerns such as whether a trial lawyer could perceive future United States Supreme Court rulings and object to acts or instructions on the basis of constitutional infirmities yet unborn. [Footnote omitted.]" App. A, 6.

The State Supreme Court did not have any record of the trial court proceedings before it, but its ruling needed no reference to such a record, since petitioner Warden's "Answer and Return" admitted all the facts alleged.

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*The State Supreme Court erroneously believed that the Warden had urged, in the alternative, "that *Mullaney* need only be applied to all cases involving criminal convictions not yet final at the time *Hankerson* was written." App. A, 5. It is clear from the Warden's brief that he did not make this argument.

2. How Federal Question Is Presented

Petitioner Warden did not raise below, *in haec verba*, the federal question whether the retroactivity principle of *Hankerson* v. *North Carolina*, *supra*, must be applied in a case on collateral review as well as in a case on direct review. The Warden did argue, however, in the brief he submitted to the Supreme Court of Appeals of West Virginia, that the issue was whether all convicted defendants were entitled, irrespective of the passage of time since conviction, to retroactive application of *State* v. *Pendry*, *supra*. App. B, 3. The Warden did not make any distinction, *in haec verba*, between an appeal and a habeas corpus as a vehicle for attacking a conviction, but it seems clear that the question whether retroactivity must be afforded on collateral attack was at least implicitly presented to the State Supreme Court.

REASONS FOR GRANTING THE WRIT

The question presented here is important because the Supreme Court of Appeals of West Virginia unnecessarily extended the retroactivity rule of *Hankerson* v. *North Carolina*, ____ U. S. ____, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977)—which was on *direct* review—to respondent Jones' case, which came to the highest court of West Virginia on *collateral* review. Limited to its facts, *Hankerson* held only that a convicted defendant who had *appealed* his case through the courts was entitled to retroactive application of *Mullaney* v. *Wilbur*, 421 U. S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), since Hankerson had sought and obtained "direct review in the Supreme Court of North Carolina." ____ U. S. at ____, 97 S. Ct. at 2343. Concurring in the judgment, both Mr. Justice Marshall and Mr.

Justice Powell limited their concurrence to the ground that Hankerson had brought his case on direct review. *Id.* at ____, 97 S. Ct. at 2346 (Marshall, J.); *id.* at ____, 97 S. Ct. at 2347-2348 (Powell, J.). These Justices clearly saved for another day the question whether *Hankerson* retroactivity should extend to a case on collateral review. It is also noteworthy that Mr. Justice Rehnquist did not participate, for it is thus evident that at least three Justices did not express the view that *Hankerson* extended to a case on collateral review. Nor, of course, did the six-Justice majority state this view, since it was unnecessary to do so to decide the case.

The importance of the question is underscored by Mr. Justice Powell's reminder in *Hankerson* that:

> "[T]he holding that a new constitutional principle is fully retroactive also may result in serious costs. Convictions *long regarded as final* must be reconsidered on *collateral* attack; frequently they must be overturned for reasons unrelated to the guilt or innocence of the prisoner, and in spite of good-faith adherence on the part of police, prosecutors and courts to what they understood to be acceptable procedures. Society suffers either the burden on judicial and prosecutorial resources entailed in retrial or the miscarriage of justice that occurs when a guilty offender is set free only because effective retrial is impossible *years after the offense*. Reopening a case also carries disadvantages for those who have been convicted:
>
> " 'Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a

> conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.' Sanders v United States, 373 US 1, 24-25, 10 L Ed 2d 148, 83 S Ct 1068 (1963) (Harlan, J., dissenting). See Schneckloth v Bustamonte, 412 US 218, 262, 36 L Ed 2d 854, 93 S Ct 2041 (1973) (Powell, J., concurring)." (Emphasis supplied.) *Id.* at ____, 97 S. Ct. at 2347.

The tremendous costs incurred by society when "perfect" justice is accomplished from hindsight by mandating retroactivity that extends indefinitely into the past simply outweigh the benefits of declaring wrong that which was viewed as right for so long a time. *Hankerson* thus should not be extended to a case on collateral review.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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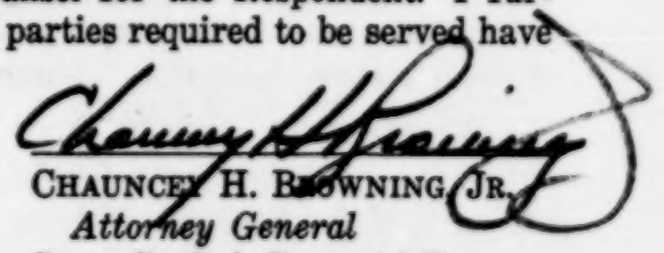
CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Sterl F. Shinaberry, Esq., 2018 Kanawha Boulevard, East, Charleston, West Virginia 25311, Counsel for the Respondent. I further certify that all parties required to be served have been served.



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APPENDICES

APPENDIX A

(Filed January 17, 1978)

Justices Neely and Miller concur and reserve the right to file concurring opinions.

No. 14010

ROGER JONES

v.

WARDEN, WEST VIRGINIA PENITENTIARY

Habeas corpus. Writ awarded.

Harshbarger, Justice

1. "In a criminal prosecution, the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged, and it is error for the court to instruct the jury in such a manner as to require it to accept a presumption as proof beyond a reasonable doubt of any material element of the crime with which the defendant is charged or as requiring the defendant either to introduce evidence to rebut the presumption or to carry the burden of providing the contrary." (Syllabus point 4, *State* v. *Pendry*, ___ W. Va. ___, 227 S.E.2d 210 (1976).

2. The proscription against unconstitutionally shifting the burden of proof in criminal trials from the state to the defendant through the use of presumptions is fully retroactive and may be raised by coliateral attack against a final conviction.

Harshbarger, Justice:

Relator, Roger Jones, seeks a writ of habeas corpus ad subjiciendum saying his conviction on November 29, 1972 for first degree murder, in the Circuit Court of McDowell County, is void as a result of this Court's ruling in *State* v. *Pendry*, ____ W. Va. ____, 227 S.E.2d 210 (1976), and the United States Supreme Court's ruling in *Mullaney* v. *Wilbur*, 421 U. S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975), and *Hankerson* v. *North Carolina*, ____ U. S. ____, 53 L. Ed. 2d 306, 97 S. Ct. ____ (1977).

The circuit court gave the following instruction, *inter alia*:

> The court instructs the jury that the law is that a man is taken to intend that which he does, or which is the natural and necessary consequences of his own act; and, therefore, if they believe from the evidence that Roger Dale Jones shot and killed the deceased, Crockett Boothe, by the deliberate use of an instrument likely to produce death, under the circumstances, then the presumption of law, arising in absence of proof to the contrary, is that he intended the consequences that resulted from said use of said deadly instrument.

This instruction is identical to one later declared constitutionally impermissible in *State* v. *Pendry*, wherein this Court applied the proscription of *Mullaney* v. *Wilbur* against shifting of the burden of proof in criminal trials from the state to the defendant through the use of presumptions.

We said in *Pendry*:

> The instruction is further deficient under *Mullaney* in that it instructs the jury that there is a presumption of law which attaches to the

> deliberate use of a deadly weapon, namely, that the defendant intended the consequence that resulted from the use thereof which arises in the absence of proof to the contrary. This instruction told the jury that when the State has introduced evidence showing Pendry's deliberate use of a deadly weapon, he was presumed to have intended the consequence in the absence of proof to the contrary. This would entitle the jury to accept proof beyond a reasonable doubt of the elements of intent and malice unless there was proof to the contrary. A presumption cannot relieve the State of proving those elements beyond a reasonable doubt. Further, this instruction seems to require Pendry to carry the burden of proving that he did not intend the consequences that resulted from using the deadly weapon. The instruction is therefore defective under traditional West Virginia principles of law and under the *Mullaney* doctrine, and if there were no other errors in the case, this instruction alone would require reversal.
>
> 227 S.E.2d at 223.

However, we concluded:

> It is our view that the doctrine of *Mullaney*, insofar as it affects the burden of proof which is carried by a defendant and insofar as it affects the utilization of "presumptions" (more properly "inferences") in instructions, *should be applied to all criminal cases now in trial or appellate process and should not otherwise be retroactive.* (Emphasis added.)
>
> 227 S.E.2d at 224.

Jones was convicted before *Mullaney* and *Pendry* and his case was not at the time of *Pendry*, in the appeal state. Thus, the issue is whether we are required to overrule our proscription of the application of

Pendry to cases in trial or appeal, and make it fully retroactive.

The question of the retroactivity to be accorded *Mullaney* is addressed by the United States Supreme Court in *Hankerson* v. *North Carolina, supra,* decided after *Pendry.* The Supreme Court of North Carolina had declined to apply *Mullaney* to trials occurring before the date on which it was decided, June 9, 1975. Hankerson's trial was on November 21, 1974, and he appealed, relying in part on the *Mullaney* decision.

The Supreme Court reversed the North Carolina Court's limited, prospective application of the *Mullaney* rule, reasoning:

> In Mullaney v. Wilbur, as in In re Winship [397 U. S. 358 (1970)], the Court held that due process requires the States in some circumstances to apply the reasonable-doubt standard of proof rather than some lesser standard under which an accused would more easily lose his liberty. In Mullaney, as in Winship, the rule was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that "substantially impairs the truth-finding function."
>
> . . . .
>
> . . . [W]e have said that the question of whether the purpose of a new constitutional rule is to enhance the integrity of the fact-finding process is a question of "degree," . . . and when the degree to which the rule enhances the integrity of the factfinding process is sufficiently small, we have looked to questions of reliance by the State on the old rule and the impact of the new rule on the administration of justice in deciding whether the new rule is to be applied retroactively. [Citations omitted.] But we have never

> deviated from the rule stated in Ivan V.[1] that " '[w]here the *major* purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule [is] given complete retroactive effect.' " [Citation omitted.]
>
> 53 L. Ed. 2d at 315, 316.

Respondent, in the action before us, argues that *Hankerson* may be interpreted restrictively to hold that *Mullaney* need only be applied to all cases involving criminal convictions not yet final at the time *Hankerson* was written. This harmonizes with and mandates no departure from the retroactivity provision set forth in *Pendry.* Respondent also notes footnote 8 in the *Hankerson* opinion[2] and argues that Jones did not interpose a *Mullaney*-based objection at trial and therefore cannot now raise a collateral attack on the bad instruction.

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[1] *Ivan V.* v. *City of New York,* 407 U.S. 203, 32 L. Ed. 2d 659, 92 S. Ct. 1951 (1972).

[2] Footnote 8 of the Court's opinion states:

Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions was as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, *e.g.,* Fed. Rule Crim. Proc. 30.

We beli e Respondent's argument incisively ferrets out the ambiguities in the *Hankerson* opinion and may be a technically viable means of avoiding its full impact. But we decline to use that method of insulating past criminal convictions from the ambit of *Mullaney*, *Pendry*, and *Hankerson*. Safeguarding the integrity of the factfinding process must take priority over procedural concerns such as whether a trial lawyer could perceive future United States Supreme Court rulings and object to acts or instructions on the basis of constitutional infirmities yet unborn.[3]

The United States Supreme Court, in *Mullaney* and *Hankerson*, has said that the duty of the state to prove beyond a reasonable doubt every element of a crime is so significant and fundamental as to go to the very heart of the factfinding process; and that where that duty has been avoided, trials in which the avoidance occurred have been illegal. Other courts have found that where a constitutional right is determined to exist which is fundamental and essential to a fair trial, the decision applies retroactively and may be raised by habeas corpus or other special post-conviction proceedings by anyone who has likewise been unconstitutionally treated. *See United States ex rel. Craig* v. *Meyers*, 329 F.2d 856 (3d Cir. 1964): *United States ex rel. Durocher* v. *LaVallee*, 330 F.2d 303 (2d Cir. 1964), *cert den.* 337 U. S. 998, 84 S. Ct. 1921, 12 L.Ed.2d 1048. *See also*, Annot., 10 *ALR3d* 1371 (1966).

We find that the spirit and language of *Hankerson* mandates that the *Mullaney* principle set forth in

[3]Neither party here addressed the effect of expanding *Pendry* retroactively on the administration of justice in West Virginia. Thus, for this Court to deny complete retroactivity because of some sort of supposed bad impact upon the administration of justice would truly be theorization.

Pendry be fully retroactive. To the extent that *Pendry* limits its own retroactivity to those cases pending appeal or in trial at the time it was decided, it is overruled.

Writ awarded.

(Filed February 2, 1978)

Neely, Justice, concurring:

I concur in the majority's holding that the rule of *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), incorporated in our case of *State* v. *Pendry*, ___ W.Va. ___, 227 S.E.2d 210 (1976), is fully and completely retroactive, extending even to permit collateral attack upon convictions not in the process of direct appellate review at the time *Pendry* or *Mullaney* were decided. This is justified exclusively because the United States Supreme Court has determined that the primary purpose of the new constitutional rule set forth in *Mullaney* is "to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials." *Hankerson* v. *North Carolina*, ___ U.S. ___ at ___ (1977) quoting *Ivan V.* v. *City of New York*, 407 U.S. 203 at 204 (1972). We are of course bound to follow the dictates of *Hankerson* in determining the retroactivity of *Mullaney* and *Pendry* in West Virginia.

Making *Mullaney* completely retroactive poses obvious problems, which Mr. Justice Powell noted in his concurring opinion filed in *Hankerson*:

> [H]olding that a new constitutional principle is fully retroactive also may result in serious costs. Convictions long regarded as final must

> be reconsidered on collateral attack; frequently they must be overturned for reasons unrelated to the guilt or innocence of the prisoner, and in spite of good-faith adherence on the part of police, prosecutors and courts to what they understood to be acceptable procedures. Society suffers either the burden on judicial and prosecutorial resources entailed in retrial or the miscarriage of justice that occurs when a guilty offender is set free only because effective retrial is impossible.

Footnote 8 of the majority opinion in *Hankerson* suggests a solution to these problems for state courts:

> Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions was as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, *e.g.*, Fed. Rule Crim. Proc. 30.

We, however, despite respondent's urging, have declined to resort to such a trap of procedure, the last avenue of escape for the third rate legal technician, even to achieve a laudatory result. It seems utterly nonsensical to deprive an innocent man of his liberty because his lawyer failed at his trial to make what

would have been regarded, under the law of that time, as frivolous objections to instructions. I think it worth repeating in this context my statement that, "to the extent possible, under modern concepts of jurisprudence, legal contests should be devoid of those sporting characteristics which gave law the quality of a game of forfeits or trial by ambush." *Rosier* v. *Garron, Inc.*, 156 W.Va. 861 at 875, 199 S.E.2d 50 at 58 (1973).

Another more sensible approach to the problems created by the retroactive application of *Mullaney* and *Pendry* is the use of the simple, but firmly established, principle that convictions need not be overturned where the constitutional error charged to have occurred is harmless beyond a reasonable doubt. *State* v. *Blair*, ____ W.Va. ____, 214 S.E.2d 330 (1975); *State* v. *Thomas*, ____ W.Va. ____, 203 S.E.2d 445 (1974). Certainly the harmless error doctrine is as much a part of our State procedural law as the requirement that a defendant object to instructions. While the United States Supreme Court's suggestion that we impale malefactors on the petard of counsel's failure to object to the offending instruction is deceptively attractive, it is logically absurd because in this jurisdiction the defendant would probably be able to argue successfully ineffective assistance of counsel, particularly if it were determined that the truth-finding function of the trial had, in fact, been impaired.

Obviously the United States Supreme Court's deference to the application of state procedural law is a response to the prospect which *Hankerson* raises of having countless thousands of armed robbers, murderers, kidnappers, and other miscreants released. I do not find this circumspection misplaced.

While one must be in sympathy with the United States Supreme Court's constant striving to further human dignity and achieve fair administration in criminal justice throughout the nation; nonetheless, one must also be in sympathy with the average citizen whose life and property are constantly in jeopardy. As the poet Hart Crane once observed: "There is the world dimensional for those untwisted by the love of things irreconcilable." Nowhere are the complexities of our goals more obvious than in criminal law which has been used as a vehicle to effect far-reaching ends in the area of human and civil rights unrelated to the bare issue of convicting the guilty and freeing the innocent. It is because criminal law is concerned as much with the proper relationship between citizen and state as with guilt and innocence that society finds it difficult to accept the courts as engines of justice. Ordered liberty demands a high tolerance for paradox; Hart Crane's dilemma is not a daunting presence in Russian jurisprudence. The practical problem in so many constitutional questions which confront us is that when civil and human rights are involved we cannot accomplish all of society's goals—choice is thrust upon us; we are confronted by Hart Crane's quandary, and must accept the odium which is the consequence of making difficult choices.

However, this is not the case with the retroactive application of *Mullaney* and *Pendry*. *Mullaney* is a case about truth, and it is concerned exclusively with freeing the innocent. Unlike other areas of criminal procedure there is no ancillary societal benefit to be derived from freeing the guilty. This is not in any way a case about the proper relationship between the State's agents and private citizens where the sanction of

denying the State a conviction is essential to protect human rights.

Accordingly I would argue that the courts of this State should vigorously apply our harmless error doctrine. When it appears that the evidence is so overwhelmingly against the defendant; his defense is so utterly unrelated to any of the intricacies of the question of intent which is the subject of the offending instruction; and, the defective instruction was harmless error in all other regards beyond a reasonable doubt, the court should dismiss a collateral challenge to a prior conviction based on *Mullaney* grounds. As we have been authorized to apply state law by *Hankerson's* footnote 8 I would prefer to announce forthrightly what we are doing rather than to rely on procedural casuistry.

It is impossible to apply the harmless error doctrine in the case before us, because the pleadings, briefs and arguments were framed to raise solely the legal question of *Mullaney's* and *Pendry's* retroactivity. Accordingly, inasmuch as I concur in the legal principle announced today, I also concur in the result which necessarily follows from the principle's application to the limited record before us. In the future the correct course should be for the State to produce the entire record so that the trial court may apply the harmless error doctrine where appropriate.

I am authorized to say that Mr. Chief Justice Caplan joins in this concurrence.

(Filed February 24, 1978)

Miller, Justice, concurring:

I join in today's opinion and, since it does not address the question of the applicability of the doctrine of harmless error, I believe it advisable to comment on the doctrine, in view of Justice Neely's concurring opinion.

Initially the doctrine of harmless constitutional error appears as an inviting panacea which would insulate the convictions of criminal defendants whose constitutional rights have been violated. If, as Justice Neely suggests, the harmless error test places primary emphasis on the amount of evidence properly admitted against a defendant, that is, overwhelming indication of guilt—then any constitutional error can be regarded as harmless.

Under the classic formulation of the doctrine, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710, 87 S.Ct. 824, 828 (1967). In devising this harmless error standard, the Court followed the approach it conceived in *Fahy* v. *Connecticut*, 375 U.S. 85, 11 L. Ed. 2d 171, 84 S.Ct. 229 (1963), where it stated that the harmless error question must be answered by determining "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87, 11 L. Ed. 2d at 173, 84 S.Ct. at 230.

The *Chapman* Court noted that not all constitutional errors must be deemed harmful and therefore

receive automatic reversal when found. It did, however, characterize the type of constitutional error that would be deemed harmless as "unimportant and insignificant." 386 U.S. at 22, 17 L. Ed. 2d at 709, 87 S.Ct. at 827.

On the other hand, *Chapman* recognized "that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23, 17 L. Ed. 2d at 710, 87 S.Ct. at 827-28. It then cited as illustrations *Payne* v. *Arkansas*, 356 U.S. 560, 2 L. Ed. 2d 975, 78 S.Ct. 844 (1958) (coerced confession); *Gideon* v. *Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S.Ct. 792 (1963) (right to counsel); *Tumey* v. *Ohio*, 273 U.S. 510, 71 L. Ed. 749, 47 S.Ct. 437 (1927) (impartial judge).

Finally, *Chapman* requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24, 17 L. Ed. 2d at 710, 87 S.Ct. at 828. Normally, the beneficiary of a constitutional error in a criminal case is the prosecution.

This Court has considered the doctrine of harmless constitutional error in several recent cases and there is no suggestion that our rule is different from the federal rule. *State* v. *Boyd*, ____ W.Va. ____, 233 S.E.2d 710 (1977); *State ex rel. Grob* v. *Blair*, ____ W.Va. ____, 214 S.E.2d 330 (1975); *State* v. *Thomas*, ____ W. Va. ____, 203 S.E.2d 445 (1974). Indeed, as *Chapman* teaches us, where the error involves federal constitutional rights the State must follow the federal harmless constitutional error standard. 386 U.S. at 21, 17 L. Ed. 2d at 709, 87 S. Ct. at 826. The State, of course, is free to set a higher protective standard under its own Constitution, but it cannot diminish its constitutional

standard where there is a parallel federal constitutional standard. *Oregon* v. *Haas*, 420 U.S. 714, 43 L. Ed. 2d 570, 95 S.Ct. 1215 (1975); *Sibron* v. *New York*, 392 U.S. 40, 20 L. Ed. 2d 917, 85 S.Ct. 1889 (1968).

With this background on the doctrine of harmless constitutional error, the question arises: Does it have any applicability to the present case?

It is of considerable interest that in *Mullaney* v. *Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S.Ct. 1881 (1975), which was the progenitor of the rule that we today hold is retroactive, the two concurring Justices urged consideration of the doctrine of harmless constitutional error. The majority, however, refused to even discuss the doctrine in *Mullaney*.

Of even greater significance is the fact that in *Hankerson* v. *North Carolina*, ____ U.S. ____, 53 L. Ed. 2d 306, 97 S.Ct. 2339 (1977), which held the *Mullaney* rule to be retroactive, there was again no discussion by any of the Justices of the doctrine of harmless constitutional error.[1]

The challenged practice condemned in *Mullaney* "*substantially* impair[ed]" the "truth finding function and so raise[d] *serious* questions about the accuracy of guilty verdicts in past trials." [Emphasis in original] U.S. at ____, 53 L. Ed. 2d at 316, 97 S.Ct. at 2344. *See also, Ivan V.* v. *City of New York*, 407 U.S. 203, 32 L. Ed. 2d 659, 95 S.Ct. 1951 (1972).

Obviously where, as in *Hankerson* and here, the challenged practice has been found to seriously impair the truth finding functions, it could not be deemed harmless error under the *Chapman* test.

Justice dissented.

[1]*Hankerson* is also unusual, if not unique, because not a single

The rule that we today announce flows inexorably from the mandate announced in *Hankerson* by a unanimous United States Supreme Court. While I agree with my concurring brothers that Note 8 in *Hankerson* is chimerical, I do not agree that the doctrine of harmless constitutional error can be applied.

We adopted the *Mullaney* rule in *State* v. *Pendry*, ____ W.Va. ____, 227 S.E.2d 210 (1976). Today's holding is dictated by *Hankerson*. Neither *Mullaney* nor *Hankerson* considered the doctrine of harmless constitutional error for the simple reason that the error was so significant that the Court obviously felt it could not be harmless. We, therefore, cannot treat it as harmless.

I am authorized to state that Justice Harshbarger joins with me in this concurring opinion.

APPENDIX B

No. 14010

IN THE WEST VIRGINIA SUPREME COURT
OF APPEALS

ROGER JONES,

Relator,

v.

WARDEN, WEST VIRGINIA
PENITENTIARY,

Respondent.

BRIEF FOR RESPONDENT

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No. 14010

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

ROGER JONES,
Relator,

v.

WARDEN, WEST VIRGINIA PENITENTIARY,
Respondent.

BRIEF FOR RESPONDENT

I.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue in this case is whether *State* v. *Pendry*, 227 S.E.2d 210 (W.Va. 1976), is to be applied retroactively and, if so, whether the retroactivity is to be partial or total. If relator Jones, who was tried for and convicted of murder in November, 1972—approximately three-and-one-half years before *Pendry* was decided[1]—is entitled to the benefit of the new constitutional doctrine announced in that case, are *all* similarly situated individuals so entitled, irrespective of the passage of time since their trial and conviction?

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[1] *Pendry* was decided on July 20, 1976.

II.

ARGUMENT

In *State* v. *Pendry*, 227 S.E.2d 210 (W.Va. 1976), this Court applied the doctrine of *Mullaney* v. *Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508, ... S. Ct. ..... (1975)—that, in a criminal prosecution, the state must prove every element of the crime charged beyond a reasonable doubt, and thus may not rely upon a presumption that decreases this burden—to a jury instruction that was identical to the instruction complained of by Jones in this case. The instruction in *Pendry*, absent the names of the accused and the victim, read as follows:

> "The Court instructs the jury that the law is that a man is taken to intend that which he does, or which is the natural and necessary consequences of his own act; and, therefore, if they believe from the evidence that [.....] shot and killed the deceased, [.....], by the deliberate use of an instrument likely to produce death, under the circumstances, then the presumption of the law, arising in absence of proof to the contrary, is that he intended the consequences that resulted from said use of said deadly instrument." 227 S.E.2d at 218.

This Court expressly held that this instruction, labeled "State's Instruction No. E," violated the *Mullaney* doctrine:

> "State's Instruction No. E constitutes prejudicial error in this case for the reason that it does not properly state the law of this State the deliberate use of a deadly weapon. This instruction, as customarily given, was required to regarding the inference which may arise from embody the fact that the presumption would arise from the deliberate use of a deadly weapon

> only when the jury believed beyond a reasonable doubt that it was used without any or upon very slight provocation. *See State* v. *Douglass*, 28 W.Va. 297 (1886); and *State* v. *Cain, supra.* The instruction is further deficient under *Mullaney* in that it instructs the jury that there is a presumption of law which attaches to the deliberate use of a deadly weapon, namely, that the defendant intended the consequence that resulted from the use thereof which arises in the absence of proof to the contrary. This instruction told the jury that, when the State has introduced evidence showing Pendry's deliberate use of a deadly weapon, he was presumed to have intended the consequence in the absence of proof to the contrary. This would entitle the jury to accept proof of the use of the deadly weapon as being proof beyond a reasonable doubt of the elements of intent and malice unless there was proof to the contrary. A presumption cannot relieve the State of proving those elements beyond a reasonable doubt. Further, this instruction seems to require Pendry to carry the burden of proving that he did not intend the consequences that resulted from using the deadly weapon. The instruction is therefore defective under traditional West Virginia principles of law and under the *Mullaney* doctrine, and if there were no other errors in the case, this instruction alone would require reversal." *Id.* at 223.

It is thus clear that *Pendry* was simply a straightforward application of *Mullaney*.

In *Hankerson* v. *North Carolina*, 45 U.S.L.W. 4717 (U.S., June 17, 1977), the Supreme Court held that *Mullaney* was completely retroactive because its primary purpose was " 'to overcome an aspect of the criminal trial that substantially impairs its truth-

finding function and so raises serious questions about the accuracy of guilty verdicts in past trials * * *.'" 45 U.S.L.W. at 4719, quoting *Ivan V.* v. *City of New York*, 407 U.S. 203, 204-205, 32 L. Ed. 2d 659, 661, 92 S. Ct. 1951 (1972). This holding goes beyond this Court's holding in *Pendry* that:

> "* * * [T]he doctrine of *Mullaney*, insofar as it affects the burden of proof which is carried by a defendant and insofar as it affects the utilization of 'presumptions' (more properly 'inferences') in instructions, *should be applied to all criminal cases now in the trial or appellate process and should not otherwise be retroactive.*" (Emphasis supplied.) 227 S.E.2d at 224.

That the kind of retroactivity mandated by *Hankerson* exceeds that found appropriate in *Pendry* is made clear by the separate opinions of Justices Marshall and Powell, who concurred in the judgment. Both Justices argued for a rule that would give retroactive effect to a new constitutional doctrine only as to cases pending on direct review, and possibly as to some cases pending on collateral review, at the time of the announcement of the new doctrine. 45 U.S.L.W. at 4720 (Marshall, J.); *id.* at 4721 (Powell, J.). The majority clearly rejected this rule in favor of *complete* retroactivity.

The *Hankerson* Court was not without concern, however, for the impact of total retroactivity on the administration of justice in states utilizing constitutionally infirm presumptions.[2] The Court indicated

[2]North Carolina had argued, presumably, that many murderers convicted long ago would simply have to be released, since retrial would, as a practical matter, be impossible because witnesses had died or otherwise disappeared, and because of other changes wrought by the sheer passage of time. *See Robinson* v. *Neil*, 409 U.S. 505, 509-510, 35 L. Ed. 2d 29, 33-34, 93 S. Ct. 876 (1973).

that the states might insulate past trials from challenge by relying upon contemporaneous-objection rules:

> "Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. *If the validity of such burden-shifting presumptions was as well settled in the States that have them as respondent asserts, then it is unlikely that prior to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions.* Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. *The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.* See, *e.g.*, Fed. Rule Crim. Proc. 30." (Emphasis supplied.) 45 U.S.L.W. at 4720n.8.

Here, Jones objected as follows to the giving of Instruction E:

> "Your Honor, this instruction is objectionable. *It does not correctly state the law. It does not infer any extenuating circumstances.* And for *a good instruction* trying to state what they are stating, I would refer you to Page 880 of Lee Criminal Law, Volume 2, because this instruction has certain, or lacks certain language that's contained in *a good instruction*, to where I refer the Court. *It does not tell the Court to tell the jury that provocation can come into play here.*" (Emphasis supplied.) R. 202.

This statement must be measured against the specificity standard of West Virginia Trial Court Rule VI(c):

> "In any case not governed by the West Virginia Rules of Civil Procedure for Trial Courts of Record, no party may assign as error the giving of or refusal to give an instruction unless he objects thereto before the arguments to the jury are begun, *stating distinctly as to any given instruction, the matter to which he objects and the grounds of his objection;* but the trial court or any appellate court, may, in order to avoid manifest injustice or clear prejudice to a party, notice plain error in the giving of or refusal to give an instruction, whether or not it has been made the subject of objection. Opportunity shall be given to make objection to the giving of or refusal to give an instruction out of the hearing of the jury." (Emphasis supplied.)

See State v. *Angel*, 154 W.Va. 615, 632, 177 S.E.2d 562, 572 (1970). Assuming, *arguendo*, that Jones' statement met this standard of specificity with respect to his claim that Instruction E was not "a good instruction" because it failed to include reference to provocation or other extenuating circumstances, the statement does not set forth, either expressly or impliedly, any "grounds of * * * objection" relating to any alleged presumption or shifting of the burden of proof. Jones thus failed to put the trial court on notice as to any argument that the instruction contained an unconstitutional presumption or unconstitutionally shifted the burden of proof.

Giving the trial court notice of the specific grounds for objection is the central purpose not only of T.C.R. VI(c), but also of Rule 51 of the West Virginia Rules of Civil Procedure, the relevant language of which is

almost identical to the comparable language of T.C.R. VI(c). As stated in *Earp* v. *Vanderpool*, 232 S.E.2d 513, 517 (W.Va. 1976):

> "We have on many occasions set forth the minimal requirements of Rule 51 applicable to the content of an objection to a given instruction. Where 'objection' is made to a portion of the court's charge or to an instruction of opposing counsel, then the objector, to preserve the error on appeal, must state 'distinctly' and precisely his grounds as specified in the Rule. *Chambers* v. *Smith*, W.Va., 198 S.E.2d 806 (1973); *Nesbitt* v. *Flaccus* [149 W.Va. 65, 138 S.E.2d 859 (1964)], *supra*. *The purpose of requiring a specific objection in this instance is to bring into focus the precise nature of the alleged errors so the trial court is afforded an opportunity to correct them.* 9 C. Wright and A. Miller, Federal Practice and Procedure, § 2554, pp. 643-44; 5A J. Moore, Federal Practice, ¶51.04, p. 2521. *See Sears* v. *Southern Pacific Co.*, 313 F.2d 498 (9th Cir. 1963)." (Emphasis supplied.)

Here, Jones "[brought] into focus" *only* his claim that the instruction was not "*good*" enough because it did not include reference to extenuating circumstances; he quite clearly did not "bring into focus"—or even suggest obliquely—any claim that it weakened the presumption of innocence or shifted the burden of proof. The trial court was thus afforded no "opportunity to correct" any defect of such character.

There is, however, an exception to both T.C.R. VI(c) and Rule 51: Either the trial court or any appellate court "may" in the interest of justice, notice *plain error* in the giving or refusal to give an instruction, whether or not it has been made the subject of objection."

(Emphasis supplied.) In the context of Rule 51, this Court has said that the discretion vested in it by this exception "must be exercised sparingly and only in exceptional cases." *Earp* v. *Vanderpool*, *supra*, at 518. Not only must "the error not preserved" be "obvious and substantially [affect] the fairness and integrity of the trial proceeding," but also such an error must constitute an "omission [that] is obvious to [the appellate court] *and should have been obvious to the trial court.*" *Id.* (Emphasis supplied.) In order to be "*plain* error" (emphasis supplied), the error not preserved must thus have been obvious *both* at the time of the appellate proceedings *and* at the time of trial. An error that is "plain" to an appellate court but was not "plain," in an objective sense, to the trial court, is, therefore, *not* "plain error."

The question thus comes down to this: Should it have been reasonably "plain" to the Intermediate Court of McDowell County in 1972—some three years before *Mullaney* and some four years before *Pendry*—that Instruction E contained a burden-shifting presumption violative of due process of law? The answer can be in the affirmative only if one believes in the quaint but unrealistic doctrine that a new constitutional decision has *always* been the law, and has been simply dormant, merely awaiting pronouncement. *See, e.g.*, *Falconer* v. *Simmons*, 51 W.Va. 172, 41 S.E. 193 (1902); *Patterson* v. *Warner*, 415 U.S. 303, 306, 39 L. Ed. 2d 343, 345, 94 S. Ct. 1026 (1974) (referring to *Falconer*). As stated *supra* at p. 2, Instruction E is identical to the instruction used, and declared invalid, in *Pendry*. The use of blanks in Instruction E indicates, furthermore, that it is a standard-form instruction, and one doubtless long used without any expectation or fear that it

was unconstitutional. As said so wisely in *Hankerson*, *supra*, 45 U.S.L.W. at 4720n.8:

> "* * * If the validity of such burden-shifting presumptions was as well settled in the States that have them as [North Carolina] asserts, then *it is unlikely that prior to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions.* * * *" (Emphasis supplied.)

It had doubtless been thought in West Virginia, before *Mullaney* and *Pendry* were decided, that a presumption or inference like that contained in Instruction E was valid. As the Court said in *Pendry* itself, 227 S.E.2d at 221, "*Mullaney* does have a *considerable impact* on the utilization of presumptions in criminal cases * * *." (Emphasis supplied.) As stated in *Adams* v. *Illinois*, 405 U.S. 278, 283, 31 L. Ed. 2d 202, 208, 92 S. Ct. 916 (1972), "[t]here was no clear foreshadowing of that rule." The only realistic view of pre-*Mullaney*, and pre-*Pendry*, trials is, therefore, that they were conducted—whether in 1900, 1930, or 1972—without the awareness of either lawyers or judges that to use Instruction E was to commit "*plain* error" (emphasis supplied). This is because burden-shifting presumptions like that contained in Instruction E were not *always* unconstitutional, but merely not always declared so, as the common-law view of retroactivity would have it; they were clearly seen as valid up until the time *Mullaney* was decided. There had been "understandable and widespread reliance upon [them] by law enforcement officials and the courts." *Adams* v. *Illinois*, *supra* at 284, 31 L. Ed. 2d at 209. The Intermediate Court of McDowell County did not simply lack "the benefit" of *Mullaney's* teachings; it was using

an instruction it had always deemed valid, and Jones failed to put the court on notice that he thought it to be invalid because it shifted the burden of proof.[3]

For the foregoing reasons, neither *Mullaney* nor *Pendry* ought to be applied to Jones' case. If, in a future case, a petitioner can show that he did object specifically at trial to an instruction on the grounds that it contained, or embodied, a burden-shifting presumption like those invalidated in *Mullaney* and *Pendry*, then he will have shown that the trial court was given the opportunity to correct such a defect, and he will be entitled to the benefits of *Mullaney* and *Pendry*.

Respectfully submitted,

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[3]In a recent case not involving retroactivity, the Supreme Court upheld the validity of a state's enforcement of its contemporaneous-objection rules in the context of federal habeas corpus. *Wainwright* v. *Sykes*, 45 U.S.L.W. 4807 (U.S., June 23, 1977). The Court's indication in *Hankerson* that it would enforce such rules in the retroactivity setting is thus not *sui generis*.

CERTIFICATE OF SERVICE

I, William D. Highland, Assistant Attorney General and counsel for respondent, do hereby certify that I served a copy of the foregoing brief upon relator by depositing same in the United States mail, postage prepaid, this 20th day of October, 1977, addressed to his counsel as follows:

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